No. 92-1384

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BARCLAYS BANK PLC,
Petitioner,

v.

FRANCHISE TAX BOARD, AN AGENCY OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The question this appeal presents is the constitutionality, under the Foreign Commerce Clause and the Due Process Clause of the United States Constitution, of California's application of the unconventional corporate income apportionment formula known as worldwide combined reporting to domestic corporations with foreign parents, or foreign corporations with foreign parents or foreign subsidiaries.

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INTEREST OF THE UNITED KINGDOM

The Government of the United Kingdom ("United Kingdom") is specifically concerned that this petition for a writ of certiorari be granted because Petitioner is a member of but one of the many United Kingdom based corporate groups that continue to be adversely affected by Respondent's insistence upon the use of the corporate income allocation formula known as worldwide combined reporting ("WWCR"). Another United Kingdom cor-

poration, Imperial Chemical Industries, PLC, was recently before this Court when the Respondent appealed the decision of the United States Court of Appeals for the Seventh Circuit that foreign parent corporations had standing to contest Respondent's application of WWCR to them and their U.S. subsidiaries.[1]

The United Kingdom, the United States and all of their major trading partners, have long subscribed to an internationally accepted standard including the globally accepted arm's length separate accounting ("AL/SA") standard for allocating profits of multinational corporations between nations. WWCR contradicts that internationally accepted standard. The United Kingdom is generally concerned the issue be finally resolved because Respondent's use of WWCR, in contradiction to the established international tax standard, continues to harm trading and investment relations between the United States and the United Kingdom.

The United Kingdom and the United States have traditionally cooperated to discuss and resolve matters of mutual concern generally, and tax matters specifically. The United Kingdom is also interested that this Court hear Petitioner's appeal because the effectiveness of future negotiations with the United States Federal Government is doubtful if U.S. policy is going to be finally determined by state courts' interpretations of Federal Government policy.

The United Kingdom hereby submits this brief *amicus curiae* in support of Petitioner.[2]

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[1] *Franchise Tax Board of California v. Alcan Aluminum, Ltd.*, 493 U.S. 331 (1990).

[2] Petitioner is successor in interest to Barclays Bank International, Limited and has assumed the interest of Barclays Bank of California for present tax matters and claims for refund.

Petitioner and Respondent have consented to the filing of this brief *amicus curiae* in letters filed with the Clerk of this Court.

STATEMENT

Ten years ago, this Court specifically reserved determination of the issue presented by this appeal, the constitutionality of Respondent Franchise Tax Board's application of WWCR to a domestic corporation with a United Kingdom parent (Barclays Bank of California ["BARCAL"], and a United Kingdom corporation with a United Kingdom parent and foreign subsidiaries (Barclays Bank International, Limited ["BBI"]).[3] The United States Federal Government, all of the trading partners of the United States, and forty-seven of the United States have chosen AL/SA in apportioning income where corporate groups operate across national borders. Thus, this appeal does not involve a simple choice between two conflicting methods of income apportionment for foreign based multinational corporate groups. A determination is required as to whether Respondent may continue to apply WWCR to subject to California's taxing jurisdiction corporations operating outside the borders of the United States, in contradiction to the established policy of the United States Federal Government and the international community.

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[3] *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

ARGUMENT

I. WORLDWIDE COMBINED REPORTING CONFLICTS WITH INTERNATIONAL TAX POLICY.

The United Kingdom, the United States, and their trading partners all avoid double taxation of their corporate citizens through the use of AL/SA. The requirement for AL/SA has been contained in every tax treaty to which the United Kingdom, the United States, and their trading partners in the western world, have been, or are now, a party.[4] Under AL/SA, corporations are subject to tax solely by the jurisdiction in which they operate and only on that portion of their income attributable to the business carried on in that jurisdiction. Profits are subsequently taxable when distributed as dividends in those jurisdictions where the dividends are received for tax purposes.

Under AL/SA, the income of each member of a corporate group is computed by separate accounting on the basis that each member of the group must deal with other members as if they were wholly separate entities owned by unrelated interests. Profitable corporations are subject to tax where the profits are made, and the less profitable or unprofitable subsidiaries pay less or no tax in the jurisdictions where they conduct business.

Using WWCR, Respondent rejects the international corporate taxation principles of AL/SA, treats separate corporations—foreign and domestic—that are part of a multicorporate group as one, and subjects all the worldwide income of the international corporate group to tax as one "unitary" corporation. It apportions the group's combined income between California and the rest of the world on the basis of an arbitrary formula composed of

[4] For example: 1975 Income Tax Convention with the United Kingdom of Great Britain, and Northern Ireland, December 31, 1975, T.I.A.S. No. 9682.

the ratio of payroll, sales, and property of the combined corporate group in California compared to the world. Moreover, the income is combined without regard to whether such income is taxable under the Internal Revenue Code or applicable treaty or has been attributed to and taxed in foreign jurisdictions, under long-standing and well-recognized procedures established in international law. No nation and no other nation's local political subdivisions use WWCR. Forty-seven of the United States do not use WWCR.[5]

II. THE LOWER COURT DECISION PUTS IN DOUBT THE ABILITY OF THE UNITED STATES FEDERAL GOVERNMENT TO SPEAK FOR THE NATION IN INTERNATIONAL TAX MATTERS.

When Respondent combines through WWCR the income of BARCAL, BBI, and all their international affiliates, there can be no doubt income already subject to tax in the country of domicile is also being taxed by California. When California reaches through WWCR income taxable by the domiciliary foreign country, it forces two equally untenable choices upon that country: (1) allow its corporations to be doubly taxed; or (2) give a credit for the tax paid under WWCR, thereby suffering a loss in its own tax revenues.

The extraterritorial grasp of WWCR contradicts the very foundation of the customs of nations in international taxation. The double taxation resulting from its use adversely affects foreign countries, their corporations and their subsidiaries. Because WWCR is not used by any country, there can be no international system to reconcile or mitigate its adverse consequences.

[5] Only California and North Dakota apply WWCR to both domestic and foreign based multicorporate groups. Montana applies WWCR only to domestic based multicorporate groups.

As this Court made clear in *Japan Lines, Ltd. v. County of Los Angeles*:

> California, by its unilateral act, cannot be permitted to place these impediments before the Nation's conduct of its foreign relations and its foreign trade.[6]

This Court has also recognized that California is in no position to negotiate with the United Kingdom or other foreign governments, and neither tax treaties nor federal law provide a mechanism by which the United States Federal Government can negotiate double taxation arising out of state tax systems.[7]

The United Kingdom, and other trading partners of the United States, must rely on the power and authority of the United States Federal Government to speak for the nation with one voice. The lower court decision would establish the principle that unless and until the United States Congress acts to specifically limit a taxing state, it is free to tax as it pleases, even if that taxation is imposed upon foreign commerce. The United Kingdom and the United States cannot continue their efforts to harmonize international tax policies and manage the difficult problems of double taxation under such principle.

III. ALL THE ELEMENTS THIS COURT HAS PREVIOUSLY DETERMINED AS NECESSARY TO FINALLY DETERMINE THE CONSTITUTIONALITY OF RESPONDENT'S APPLICATION OF WORLDWIDE COMBINED REPORTING TO DOMESTIC CORPORATIONS WITH FOREIGN PARENTS, AND FOREIGN CORPORATIONS WITH EITHER FOREIGN PARENTS OR FOREIGN SUBSIDIARIES, ARE PRESENT HERE.

Container involved Respondent's application of WWCR to a domestic parent corporation with overseas subsidiaries. In that decision, this Court specifically reserved

[6] 441 U.S. 434, 453 (1979).

[7] *Container Corp., supra* at 193.

determination of the constitutionality of WWCR when applied to domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries.[8] The issue was left unresolved because the application of WWCR to foreign based multicorporate groups presents additional considerations deserving extensive constitutional scrutiny.[9]

This case, as opposed to *Container*, involves a domestic corporation with a foreign parent, and a foreign parent with a foreign parent and subsidiaries. Here, there is: (1) an "automatic asymmetry" between Respondent's use of WWCR and the acknowledged international tax structure; (2) the tax is imposed on a foreign entity and its subsidiary; and (3) it is a matter of international concern because the United Kingdom and other countries are interested in ensuring equitable taxation of their corporations.

The serious threat to the foreign policy of the United States posed by Respondent's use of WWCR is supported by factors that also were not present in *Container*. There can be no doubt that WWCR threatens the United States' foreign policy and that the taxation policy of the United States for domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is AL/SA, not WWCR. The Solicitor General has filed *amicus curiae* briefs at every court level in support of BARCAL and BBI.[10] Also present here is

[8] *Container Corp., supra* at 188 n.26, 196 n.32.

[9] *Japan Line, Ltd., supra* at 445-446; *Container Corp., supra* at 185; *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, at p. 8 (1986); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Finance*, —— U.S. ——, 112 S. Ct. 2365 (1992).

[10] Also see: November 8, 1985 Statement of President Ronald Reagan, 45 *Weekly Compilation of Presidential Documents* 1368; January 30, 1986 Letter from United States Secretary of State George P. Shultz to the Governor of California; and March 5, 1986 Letter of United States Secretary of the Treasury James A. Baker

proof of the most obvious foreign policy implication a state tax can have, to offend the United States' trading partners and lead them to retaliate.[11]

All of the United States' major trading partners have repeatedly expressed their offense at Respondent's application of WWCR to their corporate citizens.[12] The United Kingdom, after patiently awaiting the cessation of that use for over a decade, has enacted retaliatory legislation. Section 54 of and Schedule 13 to the Finance Act of 1985 (now reenacted as Section 812-815 of the Income and Corporations Taxes Act 1988) gives the United Kingdom the authority to deprive American parent corporations, with a presence in states that use WWCR, of the shareholders' tax credit the United Kingdom gives on dividends paid by their subsidiaries in the United Kingdom.[13] As Stephen Dorrell, Financial Secretary to the United Kingdom Treasury, told the House of Commons on May 14, 1992, the retaliatory legislation is "not a mere ornament on the statute book." [14]

CONCLUSION

The United Kingdom has long awaited determination of the question presented by this appeal. Since this Court reserved determination of that issue in *Container*, United Kingdom corporate citizens have continued to be

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III to Representative Daniel Rostenkowski, Chairman of the House of Representatives Committee on Ways and Means.

[11] *Container Corp., supra* at 194.

[12] See for example: Brief of the Member States of the European Communities and the Governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden and Switzerland as *amici curiae* supporting Petitioner filed herein.

[13] House of Commons Official Report, *Parliamentary Debates* (Hansard), 1036 (9 July 1985) (statement of John Moore).

[14] House of Commons Official Report, *Parliamentary Debates* (Hansard), 810 (14 May 1992).

adversely affected by California's persistent use of WWCR. In the interim, they have been wending their way through the state and Federal courts. The United Kingdom, the United States, and their mutual trading partners have filed *amicus curiae* briefs pointing out to each court along the way, *inter alia*, how WWCR disrupts international tax policy and prevents the United States from speaking with one voice in this area of international concern.

This Court left the issue unresolved in *Container* because it recognized that the application of WWCR to foreign based multicorporate groups presents considerations not displayed by domestic multicorporate groups. All of those considerations will be before the Court in this appeal.

The United Kingdom is anxious to have the issue resolved, before more harm is done to United Kingdom corporations and to United Kingdom-United States relations, and the ability of the two countries to resolve matters of international concern as sovereign nations is further weakened.

Petitioner's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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